



NEPA: What Needs Fixing, What Doesn't, And How Would You Fix It?

The National Environmental Policy Act has been the subject of frequent debate over the last decade or so, giving rise to several attempts to change it legislatively through amendments on other bills and to restrict its scope and application, or streamline its procedures, through regulation.

Now, the chairman and ranking member of the House Committee on Resources, Richard Pombo (R-California) and Nick Rahall (D-West Virginia), have appointed 20 members to a bipartisan Task Force on Improving the National Environmental Policy Act, which as you read this is barnstorming the country, holding hearings through six regions to seek public input "to understand the current impacts of NEPA by hearing directly from the interested and affected

parties." The mandate of the task force is "to ensure that the original intent of NEPA . . . is being fulfilled."

When the hearings are concluded the task force will report on its findings and issue a set of recommendations.

Does NEPA in fact need to be fixed? That's a matter of debate, so we decided to have one with the chair of the new task force and the ranking minority member. And of course, a representative of the White House's Council on Environmental Quality, which has statutory charge of what is often called the Magna Carta of Environmental Law. And we asked representatives of the industry and environmental interests who work on a day-to-day basis with the law that began the modern environmental era 35 years ago.



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Sharon Buccino

Senior Attorney, Public Lands Program
Natural Resources Defense Council



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Nicholas C. Yost

General Counsel
White House Council on Environmental Quality (1977-81)

THE FORUM

A Law That Is Needed Now More Than Ever

SHARON BUCCINO

For over 35 years, the National Environmental Policy Act has provided an essential tool for analyzing the impacts of proposed federal agency decisions and providing the affected public a say in those decisions. NEPA and its accompanying regulations have worked well to help ensure that public resources are managed, and public funds are spent, through a public process.

Yes, we can do better. Better means improving public involvement, not curtailing it. It means doing more thorough analysis of cumulative and regional impacts, not less. It means doing more monitoring and data collection, not less. The statute does not need changing. But more resources and stronger leadership are needed to deliver NEPA's promise — informed and democratic decisions.

While everyone talks about improving NEPA, the actions of some in the administration and on Capitol Hill would circumvent NEPA. The House-passed energy bill alone, H.R. 6, contains several provisions that undercut NEPA. First, Section 2601 provides that numerous oil and gas activities on public lands "shall not be subject to review" under NEPA. The provision includes well pads less than 5 acres in size, increasing the number of wells in an existing field, disposal of water from coal-bed methane drilling, and seismic exploration. The provision could affect offshore exploration, as well as onshore. Instead of using the NEPA process to identify and address citizens' concerns about a project's impacts on their health, lifestyles, and communities, proponents of the provision excuse the government and industry from

listening. Big government and big oil have their way and local communities are left with the damage.

In addition, Title V could remove the application of federal laws, such as NEPA and the National Historic Preservation Act, from energy development decisions on tribal lands. The bill affects land both on and off reservation. It provides that once the secretary of the interior approves a tribal energy resource agreement providing a process for making energy development decisions, individual energy projects would proceed without federal approval. Since no federal action would occur, the existing guarantees of environmental review and public participation under NEPA would be lost.

Another piece of H.R. 6 requires the interior secretary to approve applications for permits to drill within as little as 10 days, restricting the ability of federal land managers to provide the environmental review and public participation required by NEPA. Finally, Sections 1808 and 2014 would allow oil and gas companies to conduct their own NEPA analysis of proposed projects — and reimburse the companies for doing so. The bill offers no criteria to ensure that analyses would be unbiased and objective.

Rather than viewing NEPA as a useful tool, proponents of these provisions see NEPA as an obstacle to drilling more public lands as quickly as possible. Our public lands can help meet our energy needs and almost 90 percent of them in the Rocky Mountain West are open for development. NEPA is the way to ensure that this development is done right.

Attacks on NEPA have surfaced in numerous other bills as well. Both the Senate and House versions of legislation reauthorizing highway funding contain provisions limiting environmental review and public participation, such as limiting consideration of alternatives. In addition, Congress has passed several provisions in

spending bills that contain "sufficiency" language declaring environmental review complete and sufficient no matter how little has been done. Section 115 of the FY '04 Energy & Water appropriations bill, for example, mandated construction of a road into the Izembek National Wildlife Refuge, short-circuiting a public environmental review process that was working.

The House Task Force has said that it wants to hear stories from people around the country about their experience with NEPA. The Task Force plans to hold six field hearings in order to decide what, if any, legislative changes are necessary. In that case, Representative Richard Pombo (R-California) and other leaders in Congress should call a halt to the various efforts happening now to weaken NEPA. If they are serious about studying NEPA and listening to everyone, they will find that many citizens from city council members to homeowners care about NEPA. They care about having a say when a highway is proposed through their neighborhood or when the Department of Energy plans to store hazardous waste nearby.

NEPA gives people a voice. The Task Force should focus on enhancing public input into government decisions, rather than silencing it. The Task Force should focus on better agency analysis, not simply less analysis. Limiting public involvement and weakening environmental review will not avoid controversy or improve projects. At a time when increasing demands are being made on our public lands and our shrinking open space, NEPA is needed more than ever. NEPA does not need an overhaul because it works.

Sharon Buccino is a Senior Attorney in the Public Lands Program of the Natural Resources Defense Council in Washington, D.C.

THE FORUM

CEQ's Task Force Offers Its Suggestions

HORST G. GRECZMIEL

The questions posed in this Forum assume that the National Environmental Policy Act of 1969 needs fixing. I welcome the opportunity to participate in this debate and share with you what the Council on Environmental Quality has found needs fixing.

NEPA calls upon federal agencies to study the environmental effects of their actions through an interdisciplinary environmental planning process intended "to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." NEPA supplements existing agency statutory mandates and authorities.

The NEPA process is designed to inform federal decisionmakers and involve the interested and affected federal, state, local, and tribal governments and the public in an analysis of the effects of proposed federal decisions on the quality of the human (ecological, aesthetic, historic, cultural, economic, social, and health) environment. The Supreme Court has affirmed on a number of occasions, including just last term, that the CEQ regulations set forth when and how to comply with NEPA. Federal agencies follow the CEQ regulations and their agency-specific NEPA procedures to conduct the NEPA process. When the NEPA process is concluded, it can be challenged in federal district court through the Administrative Procedure Act language that calls upon the court to determine whether the process — the analysis and determination of the environmental impacts of the proposed federal de-

cision — was "arbitrary and capricious," or contrary to law.

In 2003, CEQ concluded a multi-year review of the NEPA process (see <http://ceq.eh.doe.gov/ntf>). A task force composed of federal agency representatives sought public comment to determine how NEPA practice could be made more effective, efficient, and timely. The CEQ NEPA Task Force looked closely at current, often out-dated practices to develop recommendations for modernizing the NEPA process. Fully recognizing the value that NEPA provides, they examined the concern that the process was losing its focus on helping federal agencies make better-informed decisions.

The task force considered hundreds of substantive comments and held discussions with interested parties in and out of government. Over 50 recommendations, covering a broad range of practical measures to improve and reinvigorate the process, are presented in *Modernizing NEPA Implementation*, the task force report to CEQ.

Those recommendations, covering a broad range of practical measures, were then reviewed in four public regional roundtables held across the country. The public and experts from academia, business and industry, nongovernmental organizations, tribes, law practitioners, and federal, state, and local government were invited to review the recommendations. A consensus emerged affirming NEPA as a foundation for modern American environmental protection, serving the nation well for over 30 years.

However, based on their many years of experience, no one (from citizens to heads of industry and NGOs) is completely satisfied in the way NEPA is implemented by the agencies and how the public participates. There is also misunderstanding by agencies and the public about the goal of the process. The process must be interdisciplinary and should be collaborative. Collaboration does not, however, require consensus

on federal agencies' decisions and actions. NEPA collaboration is in the analysis of the environmental effects, and how the environmental issues shape decisions; the ultimate decisions on the agencies' proposed actions rest with the agency after those affected have had their environmental concerns heard and considered.

In broad terms there was a consensus that the task force report recommendations will help move forward toward one overarching, critical goal: to strengthen the NEPA process and the trust among all interested and affected parties.

In addition to the roundtables and input on the report, I have had the opportunity to travel around the country and meet with hundreds of citizens, business leaders (recreational, energy, timber, and grazing), NGOs (environmental and economic), and government representatives (tribal, state, county, and local). There is a consensus that if all the interested and affected parties (decisionmakers, managers, practitioners, nongovernmental organizations, applicants, the legal community, tribal, state and local governments, and members of the public) focused more on realizing the value of the statute, the results could bring a good deal more comity to the NEPA process and result in better decisions.

Continuing on the current path without improvements runs the risk of losing much of NEPA's promise. CEQ has now begun acting on its task force recommendations. We welcome the House Resources Committee NEPA Task Force's review of how well the federal agencies are meeting NEPA's congressional intent and have shared our findings and conclusions with them. We expect the work of the Resources Committee NEPA task force to complement the work done by the CEQ NEPA task force and look forward to the new panel's report and recommendations.

Horst G. Greczmiel is Associate Director for NEPA Oversight at the White House Council on Environmental Quality.

THE FORUM

Time For A New Look At NEPA

RICK KRAUSE

In 1969, the Soviet Union was our biggest threat, our music was played on vinyl records, and gasoline was 36 cents per gallon. That same year, Congress passed the National Environmental Policy Act.

We all know what happened to the Soviet Union, records, and the price of gas. Yet NEPA, which has cost taxpayers billions of dollars, delayed or torpedoed hundreds of federal projects, and been the center of numerous court cases, remains untouched.

Why wouldn't we encourage fact-finding about a law that has had such enormous consequences?

The American Farm Bureau Federation supports — 100 percent — the recently formed House Resources Committee task force to evaluate NEPA. We support in-depth fact-finding that should produce recommendations on improving NEPA.

At the Farm Bureau, we have seen federal projects, which would have favorably affected farmers and ranchers, stopped or drastically altered thus hurting, instead of helping, rural America. We have seen hundreds of ranchers threatened with the loss of grazing privileges simply because NEPA paperwork was not completed on time.

Searching for ways to improve NEPA makes natural sense. As the cornerstone of American environmental policy, NEPA should reflect current conditions and be able to solve problems associated with the environment and the progress of modern society.

Actually, it is doubtful that House or Senate legislators originally voting for NEPA expected the law to evolve as it has. What

started out as a few pages of statute now entails reams of supporting documentation, most of it court decisions. NEPA's provisions have been interpreted by the courts, instead of Congress.

The original intent of the law was to require consideration of the environmental impacts of agency decisionmaking, and to assure that the decisionmaking process was sound before federal projects could proceed. Farm Bureau supports this purpose. Although the intent of the law seems simple enough, producing environmental impact statements has become a jumble of red tape, exhaustive analysis and overlapping bureaucracy.

Federal agencies spend a disproportionate amount of time preparing NEPA documents in an attempt to make them litigation proof instead of spending time on the ground actually planning and gathering data for project completion. A recent Forest Service study indicated that about 40 percent of agency time is spent on NEPA or related activities.

Because of the threat of litigation and because courts have so often stepped into the process, government agencies try to insulate projects as thoroughly as possible from courts becoming involved. Their protracted investigations and paperwork can be best described as overkill.

NEPA litigation has been used to delay or scuttle federal projects, rather than to inform and provide reasonable options. Activists have used NEPA as the basis for lengthy court battles. It would appear, through the use of NEPA, the desires of the majority have been thwarted too many times, especially as the courts have extended the reach and enforcement of NEPA.

A full-scale review by the House task force can provide answers about what is working and what isn't. The task force is necessary to explore if NEPA is being enforced appropriately and whether today's enforcement is true to the intent of Congress.

The task force can provide suggestions on what might be done to more effectively engage state and local governments and local individuals and groups in decisions that affect livelihoods. In the fullest view, it is not only federal money involved but local tax monies, too. We applaud any leadership effort to strengthen the role of state, local, and tribal governments in the NEPA process, thus giving local constituents a stronger voice.

We recognize that NEPA has many exemplary aspects for environmental protection. We support the bipartisan task force that will explore ways of improving NEPA, but we do not support gutting NEPA or scrapping the act in its entirety.

It is time to look at what the law is doing correctly, and to look at some of the ways that it could work better. The task force can evaluate and promote the ways that have or will work best.

We don't know what the task force will recommend. Farm Bureau members will make their views and experiences known to the task force, and their various recommendations for change. Farm Bureau fully supports the process of re-examination. A lot has changed in 35 years.

Rick Krause is Senior Director of Regulatory Relations at the American Farm Bureau Federation in Washington, D.C.

THE FORUM

After 35 Years, NEPA Deserves A Hard Look

CATHY McMORRIS

In the late 1960s it became increasingly apparent that Congress needed to take action in order to preserve the environment, especially with regard to decisions by the federal government. Lawmakers such as Senator Henry "Scoop" Jackson from my home state of Washington and Representative John Dingell came together to pass the National Environmental Policy Act. It was bold legislation directly related to the needs of the time.

When lawmakers were discussing the ideas that would later become NEPA, it was clear that the federal government needed to consider the environmental impacts of its decisions. The primary goal was to create a national environmental policy that, in part, ensured "productive and enjoyable harmony between man and his environment."

NEPA set a national policy to create and to maintain conditions under which man and nature can exist in productive harmony and engage the public for guidance in making these decisions. In the 35 years since it was signed into law, there have been mixed reactions associated with NEPA. On one hand, the NEPA process has been credited for saving taxpayer dollars and fostering public participation. On the other, it has been consistently derided for creating vast amounts of paperwork and an endless agency decision process.

Given the huge amount of commentary and the lack of Congressional oversight it is clear that it is due time for Congress to take a hard look at NEPA and its effect on those who interact with it.

Richard Pombo (R-California), chairman of the House Committee

on Resources, which has jurisdiction over NEPA, created a task force to ensure a complete and fair process of understanding NEPA's benefits and challenges. I was chosen by Chairman Pombo to chair the Task Force on Improving the National Environmental Policy Act and look forward to leading my colleagues in this quest to better understand the law and its implications. The purpose is not just to collect stories, but to discover solutions.

One of the first questions people ask is, "What will the task force recommend?" The answer is simple: It remains to be seen. Despite the beliefs of environmental activists, I understand NEPA's important place in the fabric of our country's environmental laws. However, I don't share the view that it should be immune to evaluation. In fact, the failure to take a look at NEPA is not only a disservice to the public, but it will circumvent meaningful discussion and solutions.

While improving the NEPA dialogue has just begun, I have already heard some interesting viewpoints. Witnesses at the task force's first hearing, in Spokane, Washington, testified that NEPA should not be changed and that federal agencies need to better utilize the tools NEPA provides, including public participation. Others who interact with NEPA as applicants strongly believed that changes in the law are necessary to produce certainty and finality. Still others told the task force that so-called state mini-NEPAs provide just as much environmental analysis as NEPA, but in less time and money and with fewer lawsuits.

Most interesting and probably most deserving of a hard look is NEPA-related litigation. The impact of litigation has been a constant theme in NEPA's history as well as the early work of the task force. By 1973, Senator Jackson had expressed concern for the amount of, and type of, NEPA litigation. Distressed that lawsuits had become a tool for some to use

as part of an anti-development agenda, Senator Jackson foretold the thousands of subsequent lawsuits that have impacted nearly every federal agency.

While there may be an argument that these suits have had a positive impact, it is becoming increasingly clear to me that the negative outweighs the positive.

NEPA itself provides little guidance to the federal agencies and their actions have increasingly been guided by litigation. Court decisions vary dramatically from judge to judge, circuit to circuit. In other words, it is difficult to understand what decision might be viewed as "law breaking." What isn't difficult to understand is that agencies are playing a guessing game that has resulted in larger and larger NEPA documents. The task force must take a close look at litigation in order to determine if it furthers or frustrates NEPA's intent.

Despite the anxieties of a few, I believe the work of the task force will yield a set of recommendations based on a hard look on all sides. Whether or not legislation is the end product, the task force will be closer to returning NEPA to its original intent. By achieving that goal, everyone wins.

Representative Cathy McMorris (R-Washington) is Chair of the Task Force on Improving the National Environmental Policy Act. She is a Member of the House Resources Committee.

THE FORUM

What Doesn't Need Fixing In NEPA

TOM UDALL

In April, the Chairman of the U.S. House Committee on Resources created a Task Force on Improving the National Environmental Policy Act. The task force's charter is to review how NEPA is being administered by federal agencies and to consider what, if any, changes should be made to the law by Congress. I am honored to serve as the ranking minority member of the task force and am joined by eight of my Democratic colleagues.

Signed into law by President Richard Nixon, NEPA remains after 35 years one of the nation's most important and vibrant laws. A central tenet of our democracy is that government should be accountable to the people, and NEPA has fundamentally served to make our democracy work better by greatly enhancing citizen participation in the process of federal agency decisionmaking.

Given this legacy, the fact that some in Congress have sought to make substantive, legislative changes to NEPA, prior to the task force even beginning to hear public testimony, is troubling.

For example, Section 1702 of H.R. 6 — the Energy Policy Act of 2005, which was passed by the House on April 21 — amends NEPA as it applies to federal agency approvals of renewable energy projects, including hydroelectric dams, waste incinerators, and large-scale wind-farms.

Specifically, Section 1702 eliminates the requirement that federal agencies consider a full range of alternatives in an environmental impact statement on a major development project. Instead, NEPA analysis would be confined to the agencies' preferred alternative,

with public comments allowed for a mere 20 days.

This language turns NEPA on its head by preventing citizens from proposing, or agencies from considering, alternative locations or reduced-scale projects. In essence, Section 1702, if enacted into law, would make federal agencies more powerful, but less well informed and less accountable to the public.

This provision is part of a multitude of legislative efforts to limit NEPA's application. For example, the Healthy Forests Restoration Act of 2003 contained statutory categorical exclusions from NEPA and limitations on judicial review. In addition, new limits on environmental review and public participation are being proposed in Congress for transportation projects, water resources development, fisheries management, and a host of other activities.

It is important to note that none of the enacted or pending congressional proposals to amend NEPA are justified by either of the major systematic NEPA reviews that predate creation of this new task force.

In the President's Council on Environmental Quality January 1997 report on NEPA, *A Study of its Effectiveness After Twenty-Five Years*, CEQ Chair Kathleen A. McGinty observed:

"Overall, what we found is that NEPA is a success — it has made agencies take a hard look at the potential environmental consequences of their actions, and it has brought the public into the agency decisionmaking process like no other statute. In a piece of legislation barely three pages long, NEPA gave both a voice to the new national consensus to protect and improve the environment, and substance to the determination by many to work together to achieve that goal."

The basic conclusion of the 1997 CEQ study was that flaws in the federal agencies' implementation of NEPA — and not in the law itself — were preventing the stat-

ute from functioning as Congress intended in some cases.

More recently, in its 2003 report *Modernizing NEPA Implementation*, the Bush administration's own NEPA Task Force did not recommend amendments to NEPA by Congress. As with the 1997 review, the report focused instead on improving the way NEPA is implemented.

Given the importance of this statute, and the concurrence of these earlier reviews, those who seek to amend NEPA face a heavy burden of proof to demonstrate that such changes are necessary and in the public interest. Clearly, rifle-shot changes to the law included in larger legislative packages fail to meet either standard.

In the end, the old adage, "If it ain't broke, don't fix it," would seem to apply.

Tom Udall (D-New Mexico) is Ranking Minority Member of the Task Force on Improving the National Environmental Policy Act. He is a senior Member of the House Resources Committee and Ranking Member of the Subcommittee on Forests and Forest Health.

THE FORUM

Don't Undermine But Streamline Implementation

NICHOLAS C. YOST

NEPA is a bipartisan creation of Congress. Its Senate author, the late Henry Jackson, characterized it as "the most important and far-reaching environmental and conservation measure ever enacted." NEPA's House author, John Dingell, stressed that "we must consider the natural environment as a whole and assess its quality continuously if we really wish to make strides in improving it and preserving it." NEPA says that the federal government must look before it leaps environmentally. Instead of spending time and money trying to clean up the environmental messes left by ill-considered mistakes, the government is required to examine the environmental consequences of its actions — whether directly undertaken or through federal funding or permitting — before it undertakes them. It must devise better, less environmentally intrusive ways of doing things. In the 35-plus years since its enactment NEPA has more than fulfilled the hopes of its creators. Thinking environmentally has become part of the American way.

That said, there have always existed tensions between NEPA's environmental objectives and the delay and paperwork incidental to pursuing them. When the current NEPA regulations were adopted in 1978, they were designed to address these tensions and streamline the act's implementation. The agency responsible for overseeing NEPA, the President's Council on Environmental Quality, undertook an open and receptive process that had much to do with the successful outcome, starting with public hearings actively involving NEPA's critics as well as its friends. CEQ asked the U.S. Chamber of Commerce to coordi-

nate the presentation of the views of American business; the Building and Construction Trades Department of the AFL-CIO to do so for labor; and the Natural Resources Defense Council to do the same for environmental groups. CEQ also obtained the participation of state and local governments, the scientific community, and the public generally.

At the end of that process every major group in the United States concerned with implementation of NEPA told the council that they supported the new regulations. The Chamber of Commerce "congratulated" the council, finding the regulations "a significant improvement over prior EIS guidelines." The National Governors' Association commended the council for a "job well done." NRDC wrote to "welcome" the regulations as an "important improvement" over the guidelines. The National Wildlife Federation stated that the regulations "cut the wheat from the chaff" and will make the process "much better" for citizens and "for better decisions as well."

All had come to agree that it is good policy to study environmental consequences before acting, and all were basically satisfied with the procedures for achieving that end. That consensus reflects the basic success of NEPA.

NEPA forces government agencies to look for better, less environmentally intrusive ways of doing things and gives citizens a handle to make the government explain what it plans to do which will affect them. Chief among the act's provisions is the requirement of federal decisionmakers to devise and consider a variety of alternative methods to achieve a certain goal, alternatives which avoid or mitigate environmental harm. This mandate, described in the regulations as the "heart" of NEPA, is what makes the law work. Build a road, perhaps, but at least consider an alternate route which avoids the habitat of an endangered species. Address an energy need, but consider the least polluting means of doing so.

At the same time NEPA imposes

no straightjacket on government agencies. To the contrary, it requires thinking out of the box — devising better means of achieving goals and, indeed, occasionally questioning their validity. Sometimes scrutiny shows the project to be an environmental turkey, and the best alternative turns out to be "no action." Still, in the vast majority of cases a proposal goes forward, but it does so with its environmental impacts eliminated or reduced. NEPA's alternatives process, if properly done, does not take additional time. An appropriate range of alternatives can be considered simultaneously with the original proposal, leading to a well-thought-out course of action. What is time-consuming is attempting to undo an ill-considered act. A stitch in time, after all, does save nine.

It is important to keep in mind that the law does not require that the environmentally preferable alternative be selected. Unlike the Endangered Species Act, for instance, NEPA demands a balancing of environmental values with "other essential considerations of national policy." What NEPA does require is that the public and government decisionmakers have an opportunity to examine alternatives to preconceived courses of action, whether governmentally or applicant-driven, to consider environmentally friendly means of achieving ends. Sometimes that takes time — and sometimes too much time — but the challenge remains to streamline the law's implementation without imperiling its purpose.

NEPA is now the model for similar laws in half our states and in more than 80 countries. It may well be the most imitated law in American history. NEPA's implementation always can and should be improved, but it would be a shame to undercut this successful law in the land of its birth.

Nicholas C. Yost, who practices law in San Francisco with Sonnenschein Nath & Rosenthal, was General Counsel of the President's Council on Environmental Quality from 1977-81, when he drafted the government's regulations that implement NEPA.